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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VIII
999 18TH STREET, SUITE 500
DENVER, COLORADO 80202

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FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:)	
)	Docket No. CWA-VIII-94-23-PI
C.M & H. Tire Co., Inc.)	
747 North Avenue)	Proceeding to Assess Class I
Grand Junction, CO 81501)	Civil Penalty Under Section
)	309(g) of the Clean Water Act
Respondent)	

ORDER DIRECTING ENTRY OF RESPONDENT'S DEFAULT, AS TO LIABILITY,
WITH RESPECT TO COUNT I OF THE ADMINISTRATIVE COMPLAINT

This is a proceeding for the assessment of a Class I administrative penalty under Subsection 309(g) of the Clean Water Act ("the Act"), 33 U.S.C. §1319(g). The proceeding is governed by the Environmental Protection Agency's Proposed 40 C.F.R. Part 28 - Consolidated Rules of Practice Governing the Administrative Assessment of Class I Civil Penalties Under the Clean Water Act, The Comprehensive Environmental Response, Compensation and Liability Act, and The Emergency Planning and Community Right-to-Know Act, and The Administrative Assessment of Civil Penalties Under Part C of the Safe Drinking Water Act, 56 Fed. Reg. 29,996 (July 1, 1991), issued October 29, 1991 as superseding procedural guidance for Class I administrative penalty proceedings, under Subsection 309(g) of the Clean Water Act, 33 U.S.C. §1319(g) ("Part 28 Rules"). The ORDER directs entry of respondent's default, as to liability, with respect to Count I of the Administrative Complaint, under § 28.21(a) of the

Part 28 Rules, and directs complainant to submit a written argument regarding assessment of an appropriate civil penalty, under §28.21(b) of the Part 28 Rules.

I. BACKGROUND

The Director of the Water Management Division, of the U.S. Environmental Protection Agency Region VIII ("EPA", or "complainant"), initiated this action on August 24, 1994, by issuing to C.M. & H. Tire Co., Inc. ("respondent") an administrative complaint ("complaint") under 28.16(a) of the Part 28 Rules. A copy of the complaint was sent to the respondent by certified mail, return receipt requested (No. P573 237 250). The return receipt card shows the complaint and cover letter were received by Dorothy L. Stortz on August 30, 1994.

In addition to recitations of statutory authority, the complaint charged the respondent with two counts of violating the Act. Count I charged the respondent with the unauthorized discharge of dredge and fill material into navigable waters of the United States in violation of Section 301(a) of the Act, 33 U.S.C. §1311(a). Section 301(a) of the Act prohibits the discharge of fill material into the navigable waters of the United States, except in compliance with a permit issued by the Corps of Engineers (COE), under Section 404 of the Act. Count II charged the respondent with an inadequate response to EPA's request for Information under Section 308(a) of the Act, 33 U.S.C. §1318(a).

The complaint made reference to pertinent provisions of the

Clean Water Act; provided notice of a proposed penalty of \$10,000; notice that failure to respond to the administrative complaint within thirty days would result in the entry of a default order; and informed respondent of its opportunity to request a hearing. The notice of opportunity to request a hearing, included in the administrative complaint, gave very explicit instructions on procedures for filing a hearing request.

By a delegation dated April 16, 1990, the Regional Administrator designated the Regional Presiding Officer as the standing Presiding Officer to conduct Class I proceedings, under section 309(g) of the Act, 33 U.S.C. §1319(g).

The Respondent failed to respond to the subject complaint, in a timely manner, and as of this date has not filed a response to the subject complaint, with the Regional Hearing Clerk.

II. FAILURE TO RESPOND

Under §28.20 of the Part 28 Rules, respondent had thirty days from receipt of the administrative complaint to file a response:

Respondent's deadline. The respondent shall file with the Hearing Clerk a response within thirty days after receipt of the ... administrative complaint.

Since the certified mail return receipt for the administrative complaint was signed on August 30, 1994, the deadline for the filing a response was September 29, 1994. Under §28.7(a) of the Part 28 Rules, the thirty-day period began on August 31, 1994, and ended on September 29, 1994. As a consequence of its failure to file a response to the

administrative complaint, respondent has waived its opportunity to appear in this action for any purpose. See Section 28.20(e) of the Part 28 Rules.

Respondent's failure to file a response to the administrative complaint also automatically triggered the default proceedings provisions of the Part 28 Rules. Section 28.21(a) of the Part 28 Rules provides:

Determination of Liability. If the Respondent fails timely to respond pursuant to §28.20(a) or (b) of this Part ... the Presiding Officer, on his own initiative, shall immediately determine whether the complainant has stated a cause of action.

III. CAUSE OF ACTION

A. Count I - Unauthorized Discharge of Dredge and Fill Material.

To state a cause of action against respondent, with respect to Count I, under subsection 309(g) of the Act, 33 U.S.C. §1319(g), the Complaint must contain findings that:

Respondent is a person;

Respondent discharged a pollutant from a point source to waters of the United States; and

Respondent did not have a Corps of Engineers' ("COE") permit authorizing the discharge(s).

With respect to stating a cause of action, in the subject case, I adopt the following findings of fact and conclusions of law, set forth in the Complaint:

1. Respondent is a corporation organized under the laws of the State of Colorado. Respondent's place of business is 747

North Avenue, Grand Junction, Colorado 81501. The Respondent is a "person" as that term is defined in section 502(5) of the Act, 33 U.S.C. §1362(5)

2. Hunter Wash is a "navigable water", as that term is defined in 33 CFR §328.3(a) and 40 CFR §122.2 and Section 502(7) of the Act, 33 U.S.C. §1362(7).

3. During July of 1991, fill material, in the form of use tires, was discharged into Hunter Wash from a one-ton 1978 Ford truck owned by and operated on behalf of Respondent.

4. The fill material described in Paragraph 3 above is a "pollutant" as that term is defined in 40 CFR §232.2 and Section 502(6) of the Act, 33 U.S.C. §1362(6)

5. The vehicle described in Paragraph 3 above is a "point source" as that term is defined in Section 502(14) of the Act, 33 U.S.C. §1362(14).

6. Section 301(a) of the Act, 33 U.S.C. §1311(a), prohibits the discharge of fill material into the navigable waters of the United States, except in compliance with a permit issued by COE under Section 404 of the Act.

7. At no time relevant to this action did Respondent have a COE permit for the discharges described in Paragraph 3, above.

8. Respondent's discharges referenced above violated Section 301(a) of the Act, 33 U.S.C. §1311(a).

I therefore find that Count I of the subject complaint states a cause of action against the respondent.

B. Count II - Inadequate Response to EPA's Request for Information.

Section 308 of the Act, 33 U.S.C. §1318(a) states that:

"[w]henver required to carry out the objective of this chapter, including but not limited to ..., (2) determining whether any person is in violation of any ..., effluent limitation or other limitation, prohibition, or (A) the Administrator shall require the owner or operator of any point source to ..., (ii) make such reports, ..., and (v) provide such other information as he may reasonable require."

In order to direct entry of default under the Part 28 Rules there must be a determination of liability - §28.21(a). Section 28.21(a) requires that the Presiding Officer direct entry of default if the respondent fails to timely respond (emphasis mine). Thus, the issue in a default action is the timeliness, not the adequacy of a response (emphasis mine).

A review of the administrative record reveals that the complainant sent two requests for information to the respondent under Section 308 of the Act. The first request was issued April 18, 1994. The respondent's attorney submitted a reply to the April 18 Section 308 letter on April 29, 1994. The complainant alleged that the April 29, 1994, response was not complete? On July 26, 1994, EPA sent a second request for information to respondent's attorney alleging that the first response was not complete. On approximately August 11, 1994, EPA received a reply from respondent to the July 26, 1994, request. The complaint alleged that this reply was not responsive to either EPA's April 18, or July 26 requests. Both requests sent to the respondent stated that ... any failure to respond fully and truthfully

(emphasis mine) within ten days of receipt could result in an administrative or judicial enforcement action, including the imposition of penalties of up to \$25,000 per day of continued violation.

The quality of a response is not the issue in a default action. Time is the issue. I therefore find that the complainant failed to state a cause of action with respect to Count II of the complaint, as the responses to the Section 308 requests were not out of time. The EPA's Motion for Default with respect to Count II is denied.

IV. ENTRY OF DEFAULT AS TO LIABILITY

Having determined that complainant has stated a cause of action in Count I of the administrative complaint, the Presiding Officer must direct the Regional Hearing Clerk to enter respondent's default as to liability in the administrative record of this proceeding. See Section 28.21(a)(1) of the Part 28 Rules. Accordingly, by this ORDER, the allegations as to liability included in the complaint, with respect to Count I, shall be deemed recommended findings of fact and of law.

V. DETERMINATION OF REMEDY

In accordance with Section 28.21(b) of the Part 28 Rules, complainant shall submit within thirty days of receipt of the entry of default a written argument, with respect to Count I (with any supporting documentation), regarding the assessment of an appropriate civil penalty, limited to the nature, circumstances, extent and gravity of the violations(s), and with

respect to respondent, ability to pay, any prior history of such violations, the degree of culpability, the economic benefit or savings (if any) respondent enjoyed resulting from the violation(s), and such other matters as justice may require.

ORDER

The Regional Hearing Clerk is directed to enter the respondent's default as to liability, with respect to Count I, in the record of this proceeding.

Alfred C. Smith

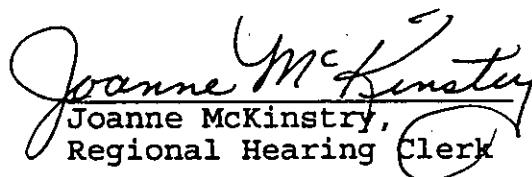
ALFRED C. SMITH
Regional Presiding Officer

Date: March 10, 1995

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the attached **ORDER** was hand-carried to Margaret J. Livingston, Attorney, Environmental Protection Agency, 999 18th Street, Suite 500, Denver, Colorado 80202-2466. A true and correct copy of the aforementioned document was sent certified, return receipt requested to:

C. M. & H. Tire Co.,
% Harold A. Stortz
775 Kennedy Avenue
Grand Junction, CO 81051


Joanne McKinstry,
Regional Hearing Clerk

on March 10, 1995.